No. 10312.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MACCO COSTRUCTION COMPANY, a corporation,

Appellant.

vs.

A. L. FARR, R. P. SINCLAIR AND YOUNG & SON CO., LTD., a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

WALTER O. SCHELL,
GERALD F. H. DELAMER,
215 West Seventh Street, Los Angeles,
Attorneys for Appellant.

Parker & Baird Company, Law Printers, Los Angeles

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APPELLANT'S REPLY BRIEF.

The brief filed on behalf of appellees contains so many statements that are not only entirely unsupported by the evidence but are also absolutely untrue that we deem it necessary to file a reply brief in answer thereto.

I.

Statement of Alleged Facts Contained in Appellees' Brief.

On page 8 appellees say:

> "The evidence discloses . . . that the appellant had control of the drivers."

On page 14 appellees say:

> "That the defendant had a permit and the trucks were under its supervision."

There is no evidence to support any of these statements. In fact since the defendant was not engaged in the transportation business it did not require and, therefore, did not have a permit under the City Carriers Act.

Defendant did not have control of the drivers, nor supervision of the trucks except to direct the drivers where to haul the dirt. Plaintiffs were personally on the job all of the time and were in complete control of the operation of the trucks. Both plaintiffs testified that they were not employees of the defendant but that they were engaged in the operation of their own trucking business [Tr. pp. 58, 101]; that they supervised and watched the drivers, on occasions firing them, and that on other occasions the defendant asked them if they could "absorb" drivers which the defendant had on its hands. [Tr. pp. 61-62, 64, 113.]

Witness Burch testified that sometimes plaintiffs did tell him that they needed drivers but that on other occasions they would procure the drivers themselves, and that the drivers would report directly to the plaintiffs. [Tr. p. 146.] It is true that the defendant actually paid the drivers but it did so merely as an advance to the plaintiffs. The defendant, however, not only paid the drivers but also advanced many other expenses incurred by plaintiffs, such as wages of mechanics, gas, oil and grease, drivers' and mechanics' Compensation Insurance, Social Security and Old Age Insurance and it also as an advance, paid for certain tires and parts for the trucks. The evidence conclusively shows that the plaintiffs continued the operation of their individual trucking business and that it was they who were operating the trucks and not the defendant.

Again on page 8 appellees state that:

> "It was only after working for some time and after unusual and severe weather and due to the muddy condition of the roads and property that the drivers were directed to go outside of the property of the Bethlehem Steel Company."

There is absolutely no such evidence in the record. On the contrary the evidence was, that at the start of the job a few thousand yards of dirt were to be hauled on to the Bethlehem property and the rest was to be hauled to the waste dump on Third street, some 4000 feet away. [Tr. pp. 149-150, 155-156, 175, 193.]

On page 26 appellees state:

> "That at a certain time in the early stages of the performance of the job the weather was such that it made it impossible to do the work under the conditions originally contemplated; that it rained constantly for ten to fifteen days prior to December, and during the early part of December; that there were no roads; that the mud was deep and that there was very little traction for the trucks; that the difficulties encountered were inescapable and not anticipated by any one."

Again on page 38 appellees refer to the

> "very unusual weather which prevented steam shovels and other work in the manner originally contemplated, the work had slowed down, trucks got stuck in the mud, shovels could not be moved from one location to another; the work did not progress as contemplated."

All of these statements are absolutely unsupported by the evidence and in fact the only evidence with regard

to weather conditions is found on pages 68 and 70 of the transcript that

> "they did have some sloppy weather; that on occasions trucks had to be hauled out by caterpillars"

and that on one occasion

> "it was raining at the dump being very soft there so that the rear end of the truck sank down to the bedding."

As to weather conditions being in contemplation of the parties, it must be remembered that the job was to be done during the winter and the Court takes judicial notice that rain in California may be expected at that period of the year.

Again on page 8 appellees say:

> "The need of a permit is too remote from the cause of the breach."

We are unable to answer this statement as we do not understand what it means.

On page 13 appellees say:

> "That the fines and penalties for operating without a permit from the Railroad Commission were never invoked against the plaintiffs"

There is no such evidence in the case despite the fact that both plaintiffs were on the stand and testified.

On pages 13 and 14 Appellees say:

> "That a license was applied for and appellant assured appellees that it was not necessary to have a license because the hauling was to be done within the property of the Bethlehem Steel Company."

Again there is no evidence to support any such statement and it is, in fact, untrue.

On page 19 appellees say:

> "That it would be a travesty on Justice if the defendant could take advantage of the work and effort of the plaintiff, accept the benefits, and then be relieved from paying compensation because the plaintiffs might violate the law."

While this happens to be the law, nevertheless the defendant has at no time refused to pay the plaintiffs for the work done by their trucks.

On page 19 appellees also say because appellant directed the trucks where to go, it was presumed to have had knowledge whether the trucks could be driven to those places. This certainly is a *non sequitur*. Appellant having directed the trucks to go to a certain place and plaintiffs having made no objection thereto, the defendant was entitled to presume that the plaintiffs had the legal right to comply with its directions, including possession of any permits required by plaintiffs to enable them so to do.

On pages 32 and 35 appellees say:

> "That in addition to $2.70 per truck hour appellant also agreed to pay $1.43 wages per man per truck hour, and that this figure included Social Security Insurance, etc."

Again the evidence utterly fails to support the latter part of this statement. In fact this $1.43 is the nearest even figure obtainable by dividing $10.00 per day, the actual wages of the drivers, by seven, being the number of hours worked per day per driver. It did not include

the employer's share of Social Security or Old Age benefits nor any amount for Compensation Insurance on these drivers.

Again on page 32 appellees say:

> "That the reason their trucks did not work more while they were on the job was because they were not permitted by appellant to work."

Again this is not supported by the record. On the contrary it appears, even from plaintiffs' own testimony, that the reason the trucks did not work more was because they were not in condition to do so.

On page 35 appellees say:

> "That there is no evidence to show that the trucks were not available and in working condition when called upon to work."

In addition to the numerous witnesses produced by the defendant, plaintiffs' own testimony shows directly to the contrary.

On page 36 appellees say:

> "That the computation of expenses submitted by appellant was not based on actual expenditures."

The evidence is directly to the contrary, this computation being a summary of the actual amounts expended by defendant on behalf of plaintiffs and did not include expenditures made directly by plaintiffs, such as personal injury, property damage, collision insurance, parts, tires nor did it include an allowance for work performed by plaintiffs personally, nor did it include any allowance for depreciation of the trucks or their tires.

Finally on pages 37 and 38, appellees set forth what their counsel would like to believe was the reason for defendant ceasing to avail itself of plaintiffs' trucks. This statement is too long to repeat here but it may be summed up in the expression "wishful thinking," there not being one iota of evidence to support any of the statements therein except the statement that it is the contention of appellant that plaintiffs' equipment was not satisfactory for the purposes for which it had been hired.

Finally on page 38 appellees say:

> "Apparently this latter contention has been abandoned as it certainly is not consistent with the position that there never was a meeting of the minds or that the contract is void."

This contention certainly has not been abandoned and we are at a loss to see where lies the inconsistency. It is appellant's contention that there was a meeting of the minds and an agreement of a hiring for an indefinite period, and so long as appellant should desire the services of the trucks. Appellant's contention that there was no meeting of the minds is limited to the supposition that the plaintiffs understood the contract to be for four months. In that event only there was no meeting of the minds. It is likewise appellant's contention that the contract was void because of plaintiffs' failure to obtain the necessary permit from the Railroad Commission. Certainly neither contention is inconsistent with the further contention that when the trucks showed up on the job and while they remained on the job, they were in no condition to perform the work contemplated at the time when the negotiations for the contract took place, whether or not these negotiations finally resulted in a valid contract.

II.

The Assignment.

Appellees say on page 4 that the acceptance of the assignment by the defendant constitutes strong evidence that there existed a contract between plaintiffs and defendant for the period of the job. In fact, as we pointed out in our opening brief, pages 7-8, the circumstances surrounding the acceptance of this assignment are all but conclusive that no such contract existed. Mr. O'Neill, the attorney for Young & Sons, testified very definitely that when he discussed with Mr. Wells the acceptance of this assignment, Mr. Wells stated that the defendant would not guarantee any payments to the plaintiffs and would accept the assignment only in so far as any moneys actually became due plaintiffs from the defendant, and that he drew the assignment with this in view, thoroughly understanding that its acceptance by the defendant was in no manner a guarantee that any moneys would be payable from the defendant to the plaintiffs. [Tr. p. 45.] The form of the acceptance very clearly shows the accuracy of Mr. O'Neill's testimony.

III.

Novation.

On page 27, *et seq.*, appellees claim that no novation took place because at that time nothing was said about the rate of payment of the drivers nor the length of time which they would work. It is appellant's contention that if the original contract did contemplate the hiring of plaintiffs for the duration of the job, then a novation of that contract took place when they acquiesced in their dismissal from the job because of their faulty equipment within the first few days, and thereafter asked to be permitted to return to the job. The essential difference between the original and the new agreement (if we assume the original agreement was for a definite period) was the change from a definite period to a hiring at will, and had nothing to do with the hourly rate to be paid plaintiffs or their drivers.

In this connection we wish to call the Court's attention to the statement of appellees on page 27 as follows:

> "At most, all that can be said was that the trucks furnished by the plaintiffs were to be equipped with steel sideboards and a steel shield."

This statement is absolutely incorrect. Appellant's witness Burch testified in detail as to this conversation, and that the trucks were not in shape to go to work because of faulty hose connections, fan belts, wiring, and other defects. [Tr. p. 142.]

IV.

The City Carrier's Act Is Not a Revenue Measure.

Appellees contend, page 10, *et seq.*, that the City Carrier's Act is merely a revenue measure, and therefore does not render void a contract in violation of its provisions.

We cannot help feeling that plaintiffs' counsel is confused between the above Act and the Highway Carrier's License Law, Stats. 1933, page 928, as amended, which is the revenue measure and which does provide for a license fee of 3% of the gross receipts, which under the rate of $2.70 per hour, would amount to 8.1¢ per hour on their gross revenue.

Not only does the City Carrier's Act (Stats. 1935, p. 1057, as amended) provide for a permit rather than a mere license, but the very preamble of that Act shows that its purpose is the regulation of the use of public highways for the common good.

For the convenience of the court, we will quote this preamble:

> "The use of the public highways for the transportation of property for compensation is a business affected with a public interest and it is hereby declared that the purpose of this act is to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating

> upon such highways; to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public."

We would also call the court's attention to *Section 2* of said Act, which reads as follows:

> "*Compliance with act essential.* No carrier shall engage in the business of the transportation of property for compensation by motor vehicle over any public highway in any city of this State, except in accordance with the provisions of this act which the Legislature hereby declares to be enacted under the power of the State to regulate the use of public highways."

Again, the first sentence of *Section 3* reads as follows:

> "Except as hereinafter provided, no carrier shall engage in the business of transportation of property for compensation by motor vehicle over any public highway in any city in this State without having first obtained from the Railroad Commission a permit authorizing such operation."

The Act then requires in some detail, as a prerequisite to the granting of a permit, the obtaining of insurance by the proposed carrier; it then provides that the rates to be charged by the carrier shall be in accordance with the rates established by the Commission and prohibits rebates, etc.; and the Act then by reference incorporates

large portions of the Public Utilities Act of the State. The Act then provides for both civil and criminal penalties, not only for operating at all without a permit, but for violation of the provisions of the Act after such permit has been obtained.

While the Act does provide in *Section 8* for the payment of certain fees, these are merely $3.00 upon the filing of an application for permit and $1.00 each year for renewal thereafter. It is perfectly obvious that this small fee is charged to meet the expenses necessarily incurred by the Commission in connection with the application, and is in no wise intended for the purpose of producing revenue.

Upon this point, the case of *Morel v. Railroad Commission,* 11 Cal. (2d) 488, 81 Pac. (2d) 144, is conclusive. This case deals with this very City Carriers' Act, and the court says at page 492:

> "The primary purpose of such regulation is to secure the adequacy, regularity, and reliability of service, and the reasonableness of rates and charges therefor."

And again, on page 499, after quoting from the preamble to the Act, the court says:

> "It is apparent therefore that one of the express purposes of the City Carriers' Act is the preservation of the highways and to that end it is declared necessary to regulate the use of the highways by those transporting property thereon for commercial purposes."

V.

Pleading Illegality of Contract.

Appellees contend that because the defense of illegality was not pleaded it was not available to the defendants.

The only authorities cited by appellees in support of this contention are certain cases dealing purely with revenue statutes and the case of *Jefferson v. Burhans,* 85 Fed. 949. The holding, however, in this case, as explained in *Mechanics Ins. Co. v. C. A. Hoover,* C. C. A 8th, 182 Fed. 590, 593, is merely:

> "The mere fact that an agreement, *the consideration and performance of which are lawful,* incidentally assists one in evading a law or a public policy, is no bar to its enforcement." (Italics ours.)

Moreover, a decision based upon Minnesota law would have no application to a contract entered into in California in violation of California law.

Finally, it is definitely settled by the California courts that the defense of illegality need not be pleaded, but that as soon as it appears that the doing of the act was or would be unlawful under the particular circumstances existing, such as the absence of a permit, the Court must deny any relief to the plaintiffs, and that this is not founded on any consideration for either parties to the lawsuit, but is based solely and squarely upon the fact that to permit any such recovery would be contrary to public policy. See numerous cases cited under subdivisions 10 and 11, pages 25 and 26 of our opening brief.

VI.

Damages.

To assist the Court in understanding the situation with respect to the financial result to plaintiffs had they continued to work on the job until its completion, we have attached hereto as an appendix a chart showing these results dependent on the amount of hours plaintiffs' trucks would have worked.

The first column of figures represents what would have been their costs per hour had each of those trucks worked the entire twenty-one hours per day, an obvious impossibility. Under the most favorable conditions trucks do require oiling and greasing and sundry current repairs. Moreover, delays and interruptions are inherent in any job, particularly one taken during the winter months—that is, the rainy season.

The next column represents the cost per hour based on plaintiffs' own estimate of the time the trucks would have worked.

The last column represents the hourly cost to plaintiffs had their trucks continued to work the same proportion of the time as they had actually worked while they were on the job.

The intermediate columns represent hourly cost based on hours per day on the trucks as set forth at the head of the respective columns.

In lines 1, 2, 4 and 5 we have used plaintiffs' own figures in each column since plaintiffs claim these figures represented cost per hour. We do not believe the evidence supports plaintiffs' contention in this respect, but for the purpose of the chart we have accepted it.

Line 4 is plaintiffs' own figure based, as they themselves say, on the trucks working 84 hours a day [Tr. pp. 107-109] which is obviously so, as $27.00 divided by 84 equals 32¢. As this item of mechanics wages remains constant, naturally as the trucks worked a less number of hours the cost per hour for this item would increase.

Furthermore, this does not take into consideration the fact that the cost as shown by actual experience was in excess of $1.00 per hour [Tr. pp. 159, 160, 224, 101, 102 and 103], nor does it make any allowance for the increase in cost that would necessarily be incurred by reason of the fact that this estimated cost of mechanics is based upon mechanics working only twenty-one hours a day, with no allowance for salaries and insurance of mechanics during the regular three hour shut down period which was the only time when work could have been done on the trucks without taking them off the job and necessarily stopping the revenue therefrom during such time. Actually each of the mechanics did work eight hours a day plus overtime. [Tr. p. 67.]

Line 7: Compensation Insurance on the mechanics amounted to 11¢ of the wages paid [Tr. p. 106] so the hourly cost of such insurance would increase in the same proportion as did the total amount of wages paid. The same applies to Social Security and Old Age tax on the mechanics (lines 7 and 8) which is figured at the rate prescribed by law, namely, 3.7%.

With regard to Compensation Insurance, Social Security and Old Age tax on the drivers (lines 7 and 8), we have used the constant figure as we have used a constant figure for the hourly cost of their wages.

Line 9 is the tax imposed by the Revenue Measure, namely the Highway Carriers License Act (Stats. 1933, p. 928 as amended), which plaintiffs have confused with the Act requiring a permit from the Railroad Commission.

Line 10 represents very low depreciation no matter how little the trucks worked. The depreciation on the trucks is based on a depreciation of $200.00 per year per truck and the depreciation on the tires is based on the minimum ordinary tire depreciation only had the trucks worked forty hours a day.

Line 11 is the value of plaintiffs' time as they themselves claim. [Tr. p. 108.] They testified they were on the job twenty-one hours a day [Tr. pp. 55, 58] so that as the trucks worked less than the full twenty-four hours, the hourly amount of this item necessarily increased. Although plaintiffs testified that there was considerable duplication in their time [Tr. pp. 55, 58] we have not included this duplication in our figures.

Line 15 is the total number of days required to complete the job after the plaintiffs had left it, multiplied by the number of hours per day shown at the head of the column.

The chart does not take into consideration the $500.00 which plaintiffs admit they earned during the period before the job was completed and which they would not have had the opportunity of earning had they continued on the job, in which latter event their financial position would have been worse by that $500.00. The item must.

therefore, be taken into consideration in determining what their loss would have been had they continued to work on the job.

We believe that this chart shows conclusively that the gross revenue of $2.70 per hour from these old trucks was insufficient to pay the usual and ordinary operating expenses of trucks of that age and in addition to support five people, to-wit, the two plaintiffs and at least three mechanics, a fact which was pointed out to plaintiffs. [Tr. p. 163.]

VII.

Error in the Refusing of Instructions.

It is highly significant that appellees in their brief do not even claim that the Court did not err in refusing to instruct the jury either with respect to the provisions of the City Carriers' Act or with respect to the necessity for the plaintiffs being "ready, able and willing," to perform their part of the contract before they would be entitled to recover.

Neither do appellees even argue that the failure to give these instructions did not constitute reversible error.

In this connection, it is interesting to note that appellees say, on page 6 of their brief, that the jury found that "appellees were ready, willing and able to perform." How could the jury have so found when the Court refused to submit this issue to them?

VIII.

Appellees' Discussion of Authorities.

In a brief of this length it will be impossible to discuss the authorities cited by appellees or to consider their discussion of the authorities cited in our opening brief. We feel confident, however, that upon an examination of the authorities cited by either party, or any additional authorities which the Court itself may read, they will all be found to support, beyond possibility of doubt, the rules of law set forth in our opening brief.

IX.

Conclusion.

We submit that appellees' reply brief has advanced no reasons why the judgment in this case should not be reversed with directions to the trial court to dismiss the action, but that on the contrary the very fact that appellees have felt themselves obliged in that brief to go so far afield from the record, as established by the evidence in this case, very conclusively shows the inherent weakness of their position.

Respectfully submitted,

WALTER O. SCHELL,

GERALD F. H. DELAMER,

Attorneys for Defendant and Appellant.

APPENDIX.

	84 hours 100%	72 hours 86%	63 hours 75%	42 hours 50%	40 hours (Actually 39.48) 47%
1. Ins. (PI, PD & Coll)	.27	.27	.27	.27	.27
2. Parts	.42	.42	.42	.42	.42
3. Mechanics	.32	.37	.43	.64	.67
4. Gas & Oil	.58	.58	.58	.58	.58
5. Down Time	.36	.36	.36	.36	.36
6. Sub-Total items listed by plaintiffs	1.95	2.00	2.06	2.27	2.30
7. Compensation Ins.:					
Mechanics	.04	.04	.05	.07	.07
Drivers	.14	.14	.14	.14	.14
8. Social Security Tax:					
Mechanics	.01	.01	.02	.02	.02
Drivers	.05	.05	.05	.05	.05
9. Tax on Gross Revenue	.08	.08	.08	.08	.08
10. Depreciation:					
Trucks	.06	.06	.06	.06	.06
Tires	.20	.20	.20	.20	.20
11. Plaintiffs' Time	.31	.36	.41	.62	.65
12. Cost per hour	2.84	2.94	3.07	3.51	3.57
13. Revenue per hour	2.70	2.70	2.70	2.70	2.70
14. Loss per hour	.14	.24	.37	.81	.87
15. Hours plaintiffs trucks would have worked	x3276	x2808	x2457	x1638	x1560
16. Loss plaintiffs would have sustained	458.64	673.92	909.09	1326.78	1357.20